Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119, 15-191

In The
Supreme Court of the United States

DAVID A. ZUBIK, et al.,

Petitioners,

v.

SYLVIA BURWELL, et al.,

Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, FIFTH, TENTH, AND D.C. CIRCUITS

BRIEF FOR THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Under federal law, health insurers and employer-sponsored group health plans generally must cover certain preventive health services, including contraceptive services prescribed for women by their doctors. Petitioners object to providing contraceptive coverage on religious grounds but are eligible for a regulatory accommodation that would allow them to opt out of the contraceptive-coverage requirement. Petitioners contend, however, that the accommodation itself violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, because the government will require or encourage third parties to provide petitioners' employees and students with separate contraceptive coverage if petitioners opt out. The question presented is:

Whether RFRA entitles petitioners not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from arranging for third parties to provide separate coverage to the affected women.

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INTERESTS OF THE AMICI

The amici States, like the federal government, endeavor in their programs and regulatory actions to respect their residents' sincerely held religious beliefs and ensure that no person is restricted or demeaned in exercising his or her religion. At the same time, governments must have the ability to meet society's collective needs, and, in accommodating our communities' varied faiths, to ensure that the interests and rights of other persons are not unduly burdened. Amici submit this brief to support the sensible balance of these goals achieved by the Patient Protection and Affordable Care Act and its regulatory accommodation allowing certain employers to opt out of the ACA's contraceptive coverage requirements.

The amici States have a longstanding and compelling interest in promoting public health and ensuring equal access to essential health services for both men and women. Many States have advanced these public health interests by expanding access to women's preventive care, including contraceptive services, through their own health plan coverage requirements. State preventive-care initiatives cannot be fully effective on their own, however, because of the preemptive effect of other federal laws. The ACA and its contraceptive coverage requirements, which serve large numbers of state residents whose health plans the States cannot regulate, thus are essential to achieving complete and fair access to contraceptive services. The amici States accordingly have a direct interest in ensuring that the federal Religious Freedom

Restoration Act is interpreted to require appropriate accommodation, but is not misconstrued to interfere with and defeat the purposes of the coverage requirements.

In addition, while RFRA does not apply directly to the States, many courts use RFRA case law to interpret the reach of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) and of state law analogs to the federal RFRA.[1] These laws apply to state action in a variety of circumstances, and can affect, for example, state antidiscrimination laws, land use decisions, and prison administration. And they have fostered a variety of state religious accommodations, including opt-out provisions similar to the accommodation challenged in this case, that are sensible and effective. Amici seek to maintain the existing, reasonable balance, which respects religious exercise and preserves state governments' ability to serve the compelling needs of all their residents.

SUMMARY OF ARGUMENT

The decisions of the circuit courts below, which uphold the ACA's regulatory opt-out accommodation for religious nonprofits, should be affirmed for all the reasons set out at length in respondents' brief.

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[1] RFRA does apply directly to amicus the District of Columbia. 42 U.S.C. § 2000bb-2(2).

Amici write to expand on three points relevant to the analysis.

First, RFRA requires a court to accept an objecting party's religious beliefs, provided they are sincerely held. Its "substantial burden" inquiry does not require a court to defer to an objecting party on questions that do not implicate difficult issues of religion and moral philosophy. Rather, those questions that can be answered as a legal matter, by resorting to judicially discoverable and manageable standards, are reserved to the courts. Questions reserved to the courts include the meaning and effect of the challenged law and whether that law actually causes the asserted religious burden. The language and intent of RFRA, as interpreted by this Court in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the routine and traditional role of courts in such determinations, and sound public policy all demonstrate that this is the correct approach to the substantial burden test.

Petitioners here sincerely object to contraception on religious grounds. They contend that the ACA's opt-out accommodation for non-profit religious organizations imposes a substantial burden on their religious beliefs, not because the associated paperwork itself is directly burdensome, but because they believe that completing the paperwork causes them to facilitate their employees' obtaining contraceptive health coverage. This is wrong as a matter of law. Under the ACA and its implementing guidelines and regulations, all covered employees – no matter their employer –

are entitled to no-cost preventive care, including contraception. The accommodation does not *cause* an outcome that violates petitioners' sincerely held religious beliefs – that is, petitioners' facilitation of the provision of contraceptive coverage. Instead, the accommodation allows petitioners to *remove* themselves from any possible role in facilitating coverage and shifts all coverage responsibilities to independent third parties. Petitioners' challenge thus relates not to their own right to free exercise, but is instead an objection to – and an attempt to unduly restrict – the independent actions of others, including the government.

Second, RFRA's "least restrictive means" inquiry does not allow an objecting party to demand, or a court to require, the restructuring of a government program to the detriment of the program's essential and compelling purposes. Women and men have a constitutional right to obtain contraceptives, and access to contraceptives is essential for public health. The ACA is designed to ensure that preventive care includes no-cost contraceptive care, free of logistical and administrative hurdles that would reduce access. Petitioners prefer a different accommodation than the one the government has devised. But all of petitioners' proposals would impose financial, practical, and administrative burdens that would impair access to contraception. These burdens would fall hardest on women, particularly those who have the fewest informational and financial resources to overcome them. Because petitioners' alternative

accommodation proposals do not serve – and in fact are at odds with – the compelling public interests served by the ACA's coverage mandate, they cannot legitimately be considered less restrictive means.

Third, an interpretation of the federal RFRA that unreasonably defers to objectors' views of burden and means could also interfere with state goals and prerogatives in protecting public health and promoting gender equity. An overbroad interpretation of RFRA in this case could undermine the existing state-federal health care partnership, leaving some residents without access to essential contraceptive coverage. Further, this Court's interpretation of RFRA could well affect the interpretation of RLUIPA and similar state laws, because courts construing those laws have often looked to federal RFRA precedent for guidance. A decision rejecting the opt-out accommodation in this case could thus adversely affect state programs and state opt-out accommodations. The sensible balance achieved by courts in these analogous circumstances should be preserved.

ARGUMENT

I. Under RFRA, Courts Must Independently Analyze Whether a Challenged Law Actually Causes the "Substantial Burden" Asserted

Amici States have a strong interest in ensuring that courts maintain an appropriate role in determining whether a challenged law "substantially burdens" the

exercise of religion under RFRA. While petitioners would treat this inquiry as presenting primarily a religious issue on which courts should defer to the views of objectors, the legal burden question has important objective aspects that do not require courts to delve into religious or moral matters. Where, as here, the substantial burden inquiry turns on questions that can be assessed without contesting or parsing the objecting party's religious beliefs, those questions can and should be decided by the courts.

The majority of courts of appeals to consider the issue have agreed that the "substantial burden" question calls for a legal conclusion and has components that must be decided by the courts as a matter of law. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (court accepted "as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature – but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"); *see also Mich. Catholic Conference v. Burwell*, 807 F.3d 738, 747-748 (6th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 217 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1178-1180 (10th Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 611-614 (7th Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247-249 (D.C. Cir. 2014); *but see Sharpe Holdings, Inc. v. U.S. Dep't of*

Health & Human Servs., 801 F.3d 927, 937 (8th Cir. 2015).

The Third Circuit's approach is representative and particularly well stated. That court held that courts "should defer to the reasonableness of the [objectors'] religious beliefs," but should also engage in an "objective evaluation of the *nature* of the claimed burden and the *substantiality* of that burden on the [objectors'] religious exercise." *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015) (emphases added). In conducting this inquiry, courts may consider, for example, "the nature of the action required of the [objectors], the connection between that action and the [objectors'] beliefs, and the extent to which that action interferes with or otherwise affects the [objectors'] exercise of religion – all without delving into the [objectors'] beliefs." *Id.*

The language and intent of RFRA, the regular role of courts in making such determinations, and the policy implications of petitioners' proposed rule demonstrate the wisdom of this approach.

RFRA expressly requires courts to assess whether a law actually and substantially burdens a plaintiff's religious beliefs. Only laws that "substantially burden" a person's exercise of religion must be the "least restrictive means" of furthering "a compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). In construing that statutory language, the courts must "give effect . . . to every clause and word" whenever

possible. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (citations and internal quotation marks omitted). While drafts of RFRA would have prohibited the government from placing any type of "burden" on religious exercise, Congress added the word "substantially" to clarify that RFRA would not impose strict scrutiny for "governmental actions that have an incidental effect on religious institutions," but only for those actions that impose substantial burdens. 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch). In enacting RFRA, Congress thus sought to strike a "sensible balance[ ] between religious liberty and competing ... governmental interests." 42 U.S.C. § 2000bb(a)(5); *see also Hobby Lobby*, 134 S. Ct. at 2786-2787 (Kennedy, J., concurring) ("[N]o person may be restricted or demeaned by government in exercising his or her religion," but "neither may that same exercise unduly restrict other persons ... in protecting their own interests, interests that the law deems compelling.").

If a plaintiff could establish that a religious burden both exists and is "substantial" based only on his or her view that it is so, without any possibility of judicial scrutiny, the term "substantial burden" would have no meaning independent of the plaintiff's articulation of his or her complaint. *See Menasche*, 348 U.S. at 538-539; *Mich. Catholic Conference*, 807 F.3d at 748; *see also Smith v. Allen*, 502 F.3d 1255, 1278 (11th Cir. 2007), *abrogated on other grounds by Sossamon v. Texas*, 563 U.S. 277 (2011) (similar analysis

under RLUIPA). Religious objectors could subject virtually any neutral law of general applicability to strict scrutiny under RFRA by simply "stat[ing] that their religious beliefs were being burdened, and that the burden was substantial" – and thus potentially undermine any number of laws with which they disagreed. *Mich. Catholic Conference*, 807 F.3d at 748. "Such an expansive reading of [the statute] . . . would require [the court] to find a substantial burden whenever *any* request in connection with a sincere religious belief was denied. . . ." *Smith*, 502 F.3d at 1278 (interpreting RLUIPA). Preserving the courts' role in construing and applying the statute's "substantial burden" standard respects the balance expressly struck by Congress.

The construction of RFRA adopted by the Second, Third, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits, maintaining an independent role for the courts in determining whether a substantial burden exists, is also consistent with this Court's pre-RFRA free-exercise decisions that RFRA was intended to restore.[2] Those cases hold that courts, rather than challengers, must decide the objective aspects of the burden inquiry. This follows because "[i]t is virtually self-evident that the Free Exercise Clause does not

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[2] RFRA states that one of its purposes is to restore the substantial-burden/compelling-interest test used in First Amendment cases before this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1).

require an exemption from a governmental program unless, at a minimum, inclusion in the program *actually* burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (emphasis added); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) (court has role in determining whether challenged regulation actually imposes substantial burden). Similarly, the courts must determine whether a plaintiff's challenge relates to his or her own free exercise or is instead an objection to the actions of others, including the government. *See Bowen v. Roy*, 476 U.S. 693, 699-700 (1986). In *Bowen*, for example, the Court held that parents could "not demand that the Government join in their chosen religious practices by refraining from using a [Social Security] number to identify their daughter," despite their belief that use of the number to identify her violated their religious beliefs. *Id.* at 700. While a plaintiff's personal "religious views may not accept this distinction between individual and governmental conduct[,] [i]t is clear . . . that the Free Exercise Clause, and the Constitution generally, recognize such a distinction; for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Id.* at 701 n.6.

Similarly, the determination of whether a law actually and substantially burdens a plaintiff's religious exercise involves the types of inquiries that courts routinely make. The determination often requires an assessment of whether or not the law

causes the objector (as opposed to a third party) to take certain action that would violate the objector's religious beliefs. Courts regularly interpret laws and resolve questions of causation and substantiality, which are well within their institutional competency. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (it is the courts' duty to "say what the law is"); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425, 1430 (2012) (case did not present political question concerning Jerusalem's status; court could answer question presented by interpreting relevant statute and determining its constitutionality); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1393 (2014) (evaluating whether a plaintiff's injuries were proximately caused by defendant); *Gunn v. Minton*, 133 S. Ct. 1059, 1065-1066 (2013) (assessing whether a state law claim implicates a "substantial" federal issue). Likewise, the courts should be responsible for determining whether, as a legal matter, the opt-out accommodation challenged in this case works as intended to alleviate any substantial burden on petitioners' religious beliefs from the ACA's contraceptive coverage mandate.

Indeed, this Court in *Hobby Lobby* reaffirmed that courts must resolve the "question that RFRA presents" – whether a law "imposes a substantial burden on the ability of objecting parties to conduct business in accordance with *their religious beliefs*" – while refraining from addressing the "very different question" of "whether the religious belief asserted in a RFRA case is reasonable[ ]." 134 S. Ct. at 2778.

In that case, the Court declined to consider whether the *degree* of causal connection between "what the objecting part[ies] must do" and the "end they find to be morally wrong" was "simply too attenuated" to constitute a substantial burden. *Id.* at 2777. But it did not hold that courts must refrain from examining whether a law actually burdens a plaintiff's religious exercise at all – particularly in the context of evaluating the adequacy of a government accommodation. *See id.* at 2778 (recognizing objector's concern with "facilitating" religiously objectionable outcome); *id.* at 2786 (Kennedy, J., concurring) (noting that extension of existing accommodation to objectors would eliminate any impingement).

The need to preserve a role for the courts in determining the existence of a "substantial burden" is highlighted by considering the natural results of petitioners' complete deference approach. As the petitioners in *Priests for Life* acknowledged before the D.C. Circuit, their position would require courts to defer to a plaintiff's determination of what constitutes a substantial burden *even if* that view was objectively and demonstrably false. Under their theory, a plaintiff who 1) sincerely believed that manufacturing weapons violated his religion, 2) worked in a factory making farm equipment, but 3) mistakenly *believed* that he was making weapons for war would be entitled to a determination that working in the farm-equipment factory substantially burdened his religious beliefs – even though the underlying premise for his claim was objectively

mistaken. *See Priests for Life*, 772 F.3d at 249 n.14 (citing Oral Arg. Tr. at 9:3-11:16; 22:16-23:24). Any such approach would lead to absurd results and fails to honor the "sensible balance" that RFRA establishes.

In this case, an objective examination of the impact of the ACA and its regulations makes clear that there is no substantial burden on religious exercise because there is no causal connection between what petitioners are required to do and the actions they assert would violate their beliefs. Petitioners argue the opt-out accommodation violates their religious beliefs because it requires them to submit documentation that in turn "authorizes, obligates, and incentivizes their insurance companies to deliver abortifacient and contraceptive coverage to their plan beneficiaries." Zubik Pet. Br. 19; *see also* E. Tex. Baptist Univ. Pet. Br. 20. A straightforward review of the regulations and their operation makes plain that the accommodation does not operate in this way.

Congress determined in passing the ACA that all participants in employer-sponsored health plans are entitled to access to essential preventive health care, with no out-of-pocket costs, and charged the Health Resources and Services Administration (HRSA) with determining which preventive services should be

required.[3] The HRSA established preventive care guidelines that include FDA-approved contraceptive methods as part of a suite of essential services, and the ACA's implementing regulations require coverage of all such services.[4] But the ACA's implementing regulations also allow an objecting employer, through the opt-out accommodation, to remove itself from the provision of contraceptive coverage.[5] In that case, the government requires the insurer or third-party insurance plan administrator (TPA) "to be responsible for providing information and coverage" for employees' access to contraceptive care. *Hobby Lobby*, 134 S. Ct. at 2782.[6] Specifically, when an employer objects, the

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[3] 42 U.S.C. § 300gg-13(a)(4) requires employers to provide "such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration . . . ." The referenced guidelines, as codified, require the coverage of all FDA-approved contraceptives. *See* 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2016); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2016); Health Resources and Services Administration Women's Preventive Services Guidelines, available at www.hrsa.gov/womensguidelines/ (last visited Feb. 17, 2016).

[4] *See* 26 C.F.R. § 54.9815-2713(a)(1)(iv) (2016); 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2016).

[5] *See* 29 C.F.R. § 2950.715-2713A(a) (2016); 45 C.F.R. § 147.131(a)-(d) (2016).

[6] *See* 29 C.F.R. § 2590.715-2713A(b)-(c) (2016); 45 C.F.R. §§ 147.131(c)-(d), 156.50(d) (2016). A third-party administrator (TPA) is an "entity that processes insurance claims and provides administrative services for employers with self-insured group health plans." *Little Sisters*, 794 F.3d at 1158. In the case of a self-insured church plan, which is exempt from the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

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accommodation excuses that employer from the contraceptive coverage requirement, severs the employer from any involvement in the separate contraceptive coverage to which its employees are entitled by law, and specifies that the third party must notify employees that the employer has no involvement in providing their contraceptive coverage.[7]

In other words, the opt-out accommodation determines the *manner* in which access to contraceptive care will be provided: either the employer will play some direct or intermediary role, or an independent third party will assume those responsibilities. The opt-out allows the government to have a system in place to ensure that the independent third party can effectively recognize and discharge its obligations, without burdening employees or risking gaps in coverage. But the employer's provision of an opt-out notice does not affect *whether* covered employees have a right to coverage. Employees are entitled to coverage as a matter of statutory right regardless of the decision of the employer to avail itself of the opt-out accommodation. *See Univ. of Notre Dame*, 786 F.3d at 612-614 (explaining that the ACA's opt-out accommodation "throw[s] the entire

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§§ 1001 *et seq.*, the government cannot require coverage. In that limited context, the regulations encourage, rather than require the third-party TPA to provide coverage. *Little Sisters*, 794 F.3d at 1188.

[7] 26 C.F.R. § 54.9815-2713A(b)-(d) (2016); 29 C.F.R. § 2590.715-2713A(b)-(d) (2016); 45 C.F.R. § 147.131(c)-(d) (2016).

burden of" administering contraceptive coverage onto third party entities; even where an objecting employer refuses to fill out the form, third party entities "would still be required to provide the services to the university's students and employees").

Thus, the law sets up a system where an objecting employer may *remove* itself from the chain of "authorizat[ion], incentiviz[ation], or obligat[ion]" of the insurer to provide contraceptive services. Those services will then be provided to the objector's employees through the federal law's independent requirements placed on third parties. This system "respect[s] the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage." *Hobby Lobby*, 134 S. Ct. at 2759.

Petitioners further object because they believe the opt-out accommodation requires them to use their "own [health] plan infrastructure to provide seamless coverage to which [they] hold sincere religious objections." E. Tex. Baptist Univ. Pet. Br. 42; *see also* Zubik Pet. Br. 28. Like petitioners' prior argument, this contention misconstrues how the ACA and its implementing regulations work. Once an objecting employer opts out, that employer's health plan infrastructure is *not* used to provide contraceptive services to its employees – rather, coverage is delivered through the independent infrastructure of third-party entities as

required by federal law. As explained above, it is the government (an independent third party) that requires that the insurer or TPA (also an independent third party) make contraceptive services available in a way that is separate and distinct from the coverage provided under the employers' plan. Thus, there is no causal link between the required action and the objected-to result. If there is no causation, there can be no substantial burden.

The fact that this case is a challenge to an accommodation that is designed to *remove* petitioners from any facilitating role as a matter of law distinguishes this case from *Hobby Lobby*. In *Hobby Lobby*, the objecting for-profit, closely held employers were required to provide and pay for employees' health coverage that included certain types of contraception. 134 S. Ct. at 2777-2778. At the time, the opt-out accommodation was available only to non-profit religious employers. *Id.* at 2763. The United States argued that the connection between the acts required of objecting employers and the result they believed to be morally wrong (destruction of an embryo) was "too attenuated" to amount to a substantial burden on the belief. *Id.* at 2777. This Court refused to engage in that inquiry, holding that it implicated difficult religious and moral questions that courts should not presume to address. *Id.* at 2778. Here, by contrast, the courts need not delve into religious or moral questions concerning the permissible *degree* of facilitation of an objected-to result, because, as an objective matter, the opt-out mechanism allows an objecting

employer to avoid facilitating the result at all. *See id.* at 2786 (Kennedy, J., concurring) (providing opt-out accommodation to for-profit, closely held religious employers "furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs"). This "is an issue not of moral philosophy but of federal law." *Univ. of Notre Dame*, 786 F.3d at 623 (Hamilton, J., concurring). It is therefore for the courts to decide.

II. RFRA's "Least Restrictive Means" Inquiry Does Not Require the Restructuring of a Government Program to the Detriment of Its Compelling Purpose and the Interests of Third Parties

Even if the opt-out accommodation did impose a substantial burden on the exercise of religion, there is no available, effective, and less restrictive means of furthering the government's compelling interests in protecting public health and promoting gender equity. RFRA requires that the government appropriately accommodate religion, if it can do so without compromising the compelling public interest in providing women with access to effective, cost-free contraceptive care with minimal logistical and administrative barriers. The Court should reject petitioners' attempt to use RFRA to force the restructuring of the ACA's operation to the detriment of that interest and of the women whose health the law is designed to protect.

A. The Government Has Compelling Health and Equity Interests in Providing Women with Effective Access to Contraceptive Care

This Court's decision in *Hobby Lobby* was premised on the understanding that the ACA's contraceptive coverage mandate "furthers a legitimate and compelling interest in the health of female employees." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). "[T]he mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee. There are many medical conditions for which pregnancy is contraindicated." *Id.* at 2785-2786 (citation omitted). Respondents' brief discusses the extensive evidence on this point. Resp. Br. 55-58. Amici concur in these arguments and briefly highlight several points of particular importance to the States.

It is well established that access to effective contraception is essential to women's health, financial independence, and social well-being. As this Court has recognized, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992). By enabling women to better time and space their pregnancies, contraception has significant social and health benefits for both women and families. Resp.

Br. 55-56. Contraceptives also provide many important health benefits apart from avoiding unintended pregnancies, including decreasing the risk of certain ovarian and uterine cancers, treating menstrual disorders, and preventing other menstrual-related health effects. Resp. Br. 56-57. And providing women with access to effective contraception significantly reduces the incidence of abortion. Resp. Br. 56, 57-58 n.22. Further, ensuring that contraception is readily available to women who want it, without cost-sharing and with minimal practical barriers, is essential to promoting gender equity in health care, where women have long experienced discrimination. Notably, women of child-bearing age spend 68 percent more in out-of-pocket health care costs than men, primarily owing to reproductive and gender-specific conditions. 155 Cong. Rec. S12,021-02, 12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand); Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 19 (2011) (IOM Report). The ACA's objective to provide effective, efficient, and complete preventive care for women cannot be met without ensuring their access to contraceptive services.

B. The Opt-Out Accommodation Is the Least Restrictive Means of Serving These Compelling Interests

The accommodation at issue is "an existing, recognized, workable, and already-implemented framework" that "may be made to the employers without imposition of a whole new program or burden

on the Government." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). It requires only that employers identify themselves as objecting to the contraceptive coverage mandate on religious grounds.[8] Because there is no basis to presume that all religiously affiliated employers will oppose contraceptive coverage for their employees – indeed, many do not – the government can provide objecting employers this accommodation only if they self-identify. *See Priests for Life*, 772 F.3d at 264-265.

Petitioners suggest other approaches that they deem to be less restrictive, but none would effectively serve the government's compelling interests.[9] When

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[8] The accommodation has expanded since the *Hobby Lobby* decision to allow employers to opt out in two separate ways – they may either deliver a form to their insurance issuer or TPA or send a notification to HHS. *Little Sisters*, 794 F.3d at 1159.

[9] Specifically, petitioners have proposed (1) creating a new government-run contraceptive insurance program; (2) expanding Title X to provide universal contraceptive insurance; (3) expanding Medicaid or other "public options" to provide universal contraceptive insurance; (4) requiring covered employees to find their own supplemental contraceptive insurance on the ACA's exchanges, perhaps with subsidies; or (5) requiring covered employees to pay up-front for contraception without insurance and then receive after-the-fact reimbursements or tax deductions or credits. *See* Zubik Pet. Br. 72-82; E. Tex. Baptist Univ. Pet. Br. 72-78.

Even under strict scrutiny, the government "need not 'do the impossible – refute each and every conceivable alternative regulation scheme'" – but "need only 'refute the alternative schemes offered by the challenger.'" *Holt v. Hobbs*, 135 S. Ct. 853, 868 (2015) (Sotomayor, J., concurring) (quoting *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011)); *cf. Ashcroft v.*

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defending a regulation under strict scrutiny, generally the government is only required to demonstrate that the regulation is the least restrictive means "among *available, effective* alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (in context of First Amendment challenge) (emphasis added). Here, "effective access" to contraceptive services requires providing them "seamlessly together with other health services, *without cost sharing or additional administrative or logistical burdens* and within a system familiar to women. . . ." *Priests for Life*, 772 F.3d at 265 (emphasis added). "[C]ontraceptive use is highly vulnerable to even seemingly minor obstacles," and "[i]mposing even minor added steps would dissuade women from obtaining contraceptives and defeat the compelling interests in enhancing access to such coverage." *Id.*; *see also* Coverage of Certain Preventive Services Under the ACA, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) ("Imposing additional barriers to women receiving the intended coverage (and its attendant benefits), by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women."); *id.* at 39,876 (recognizing the "barriers in access to care" that would occur if participants and beneficiaries had "to have two separate health insurance policies (that is, the group health

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ACLU, 542 U.S. 656, 666 (2004) (government's burden in free-speech context is to refute the challengers' "*proposed* less restrictive alternatives") (emphasis added).

insurance policy and the individual contraceptive coverage policy)"); IOM Report at 109 ("The elimination of cost sharing for contraception . . . could greatly increase its use, including use of the more effective and longer-acting methods, especially among poor and low-income women most at risk for unintended pregnancy.").

Petitioners' proposed alternatives would compromise the law's ability to serve these interests. All of petitioners' proposals would place new hurdles in front of women, requiring them to take additional steps to obtain contraceptive coverage on their own – outside of the channels of the rest of their health coverage. Moreover, several proposals would require the creation of new government-run contraceptive coverage programs, and some would require women to incur significant out-of-pocket costs that might or might not be reimbursed. Each proposal would impose financial, practical, informational, or administrative burdens that would impair women's access to contraception, and thereby undermine the essential governmental interests in providing women with access to effective, cost-free contraceptive care with minimal obstacles. Federal administrators considered such alternative proposals but rejected them for these reasons, among others. *See* Coverage of Certain Preventive Services Under the ACA, 78 Fed. Reg. at 39,888.

As HHS explained, the ACA "contemplates providing coverage of recommended preventive services through the existing employer-based system of

health coverage so that women face minimal logistical and administrative obstacles." Coverage of Certain Preventive Services Under the ACA, 78 Fed. Reg. at 39,888. The barriers to women obtaining contraception under petitioners' proposals are particularly acute: given the employers' religious objections to facilitating contraception in any way, affected women would not receive any notice from their employers about the existence of alternative options for obtaining contraceptive care, much less instruction about how to navigate those options. To obtain care under any of petitioners' proposals, women would have to independently discover that contraceptive coverage was available outside of the ordinary employer-sponsored channels; independently figure out how to apply for and obtain such coverage and care; and, depending on which alternative was adopted, potentially pay out-of-pocket costs to obtain care.

Given that even minor obstacles can significantly reduce access to contraception, the significant barriers created by petitioners' proposed alternatives would effectively prevent the government from serving its compelling interest in providing women with seamless access to contraceptive coverage. The government is required to demonstrate only that the regulation is the least restrictive means "among available, effective alternatives." *Ashcroft*, 542 U.S. at 666. Requiring women to overcome the significant barriers set out by the alternative proposals, and turn to programs that do not currently exist to gain coverage, is neither an "available" nor an "effective" alternative.

Moreover, RFRA does not require the government to provide accommodations that would unduly infringe upon the rights of third parties. "[I]n applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'" *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *see also id.* at 2786-2787 (Kennedy, J., concurring) (religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling"). "[A]n accommodation must be measured so that it does not override other significant interests." *Cutter*, 544 U.S. at 722.

Indeed, central to this Court's holding in *Hobby Lobby* was its determination that the accommodation petitioners challenge in this case would *not* unduly interfere with third-party interests because employees would receive seamless contraceptive coverage after their employers followed the opt-out procedure. The Court saw "no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate. . . ." *Hobby Lobby*, 134 S. Ct. at 2782. It acknowledged that an "approach that would [i]mped[e] women's receipt of benefits by requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit" is "scarcely what Congress contemplated" under RFRA. *Id.* at 2783 (internal quotation marks omitted). And it concluded that the opt-out accommodation now challenged

would *not* hinder women's access to benefits. *See id.* Here, in contrast, all of the proposed alternative accommodations would impede women employees' access to contraception.

If RFRA were interpreted to allow religious objectors to dictate the precise manner of accommodation and thereby unduly infringe upon the rights of third parties, it would raise serious questions as to RFRA's constitutional validity under the Establishment Clause. An accommodation may not "unyielding[ly] weight[]" religious interests "over all other interests." *Cutter*, 544 U.S. at 722.[10] In *Cutter*, this Court upheld RLUIPA against a facial Establishment Clause challenge precisely because the Court did "*not* read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety" and had "no cause to believe that RLUIPA would not be applied in an appropriately balanced way." *Id.* at 722 (emphasis added). RFRA should be construed in a similar, balanced manner.

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[10] *See also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) ("'The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.'") (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Learned Hand, J.)); *cf. United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

In addition, any potential alternative accommodations must be reasonable in terms of costs and administrative burdens. Even under strict scrutiny, the government is not required to go to unreasonable lengths to accommodate religious beliefs, but instead need only offer such accommodations as are reasonably available under the circumstances. "[C]ontext matters" in the application of the compelling-interest standard, and this Court has recognized that under RLUIPA, the government is "free to resist the imposition" of requests for religious accommodations that "become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution." *Cutter*, 544 U.S. at 723, 726; *see also Hobby Lobby*, 134 S. Ct. at 2781 ("[C]ost may be an important factor in the least-restrictive-means analysis."). Here, petitioners' proposals – including the creation of a new government-run contraceptive insurance program, and the expansion of existing government programs such as Title X, Medicaid, or other "public options" to include universal contraceptive coverage programs open to all – would impose unreasonably high costs and administrative burdens on the government. Such costs and burdens are grossly disproportionate to any burden that the opt-out accommodation imposes on religious practice. Resp. Br. 79-85.

Several of our sister States propose to rely on state-run contraceptive programs as a purportedly less restrictive alternative. *See* Br. for the States of Texas, et al. at 19-20. This proposal is also unworkable,

suffering from these same shortcomings of imposing extra burdens on both women and the government.

The opt-out accommodation is "an existing, recognized, workable, and already-implemented framework." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Petitioners point to no alternative that would adequately serve the government's compelling interest in providing women with effective access to contraceptive care.

III. An Interpretation of RFRA that Unreasonably Defers to an Objector's Views of Burden and Means Would Interfere with State Objectives and Prerogatives

An interpretation of RFRA that would invalidate the opt-out accommodation, requiring the federal government to offer a different accommodation and disrupting women's access to contraceptive care, would also interfere with state objectives and prerogatives in protecting public health and promoting gender equity. As discussed below, although RFRA does not apply directly to the States, States must rely on the ACA's contraceptive coverage mandate to ensure that their many residents covered by certain types of health plans have access to contraceptive care. Further, adopting petitioners' interpretation of RFRA, with its almost-complete deference to a plaintiff's positions concerning substantial burden and least restrictive means, could disrupt the interpretation

and application of other laws, particularly RLUIPA, that apply directly to States.

A. An Overbroad Interpretation of RFRA Would Harm State Women's Health and Gender Equity Objectives

Although RFRA applies only to the federal government, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), an interpretation of RFRA that would invalidate the ACA's opt-out accommodation would also interfere with States' ability to advance their own important objectives. The amici States share the compelling interests in protecting public health and promoting gender equality that are furthered by the federal contraceptive coverage mandate. *See* Resp. Br. 54-58. Indeed, a majority of States have enacted their own contraceptive-coverage requirements. *See* Guttmacher Inst., *State Policies in Brief: Insurance Coverage of Contraceptives* 2 (2016).[11] These efforts have met with considerable success, but their reach has been limited by federal preemption of state regulation of self-funded health plans under ERISA. *See FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990). ERISA plans cover 63% of all U.S. workers who are covered by employer-sponsored insurance. *See* Kaiser Family Found. & Health Research & Educ. Trust,

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[11] Available at http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

Employer Health Benefits: 2015 Annual Survey 174, 176 (2015).[12] The coverage offered by these plans generally cannot be regulated by state law. Thus, the States must rely on federal law, including the ACA, to ensure that their residents have access to essential contraceptive coverage.

In addition, an interpretation of RFRA that would allow religious objectors to impose barriers to women's access to contraception could also increase the costs of health coverage. Contraception is highly cost-efficient compared with the costs of unintended pregnancies. For example, a 2010 analysis projected that "expanding access to family planning services under Medicaid *saves $4.26 for every $1 spent*." 78 Fed. Reg. at 39,872 (emphasis added). The States have first-hand experience with these costs, as the average publicly funded birth costs $20,716 (from prenatal care through 60 months), and the public costs from unintended pregnancies totaled $21 billion in 2010, of which States shouldered $6.4 billion. *See* Adam Sonfield & Kathryn Kost, Guttmacher Inst., *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care: National and State Estimates for 2010* 8 (2015).[13] In 2010, California alone spent more than $689 million in state funds on costs

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[12] Available at http://files.kff.org/attachment/report-2015-employer-health-benefits-survey.

[13] Available at https://www.guttmacher.org/pubs/public-costs-of-UP-2010.pdf.

related to unintended pregnancies. *Id.* at 13. Other States also incurred significant expenditures, particularly when measured per capita: for example, Maryland spent approximately $181 million, Massachusetts $138 million, New Mexico $48 million, and New York $601 million. *Id.* It is reasonable to think that if women with private insurance were to lose effective access to contraception, the costs of resulting unintended pregnancies would be similarly significant. These costs are borne by their insurance pool, and thus, could drive up the overall costs of health insurance. The amici States have a strong interest in ensuring that their residents have access to health coverage that is not only accessible but also affordable.

B. An Overbroad Interpretation Could Disrupt the Application of Laws that Look to RFRA Precedent and Apply Directly to the States

Amici States are interested in the outcome of this case not only for its direct effects, but also for its potential to disrupt settled precedent in analogous areas of law that apply directly to the States.

Under RLUIPA, for example, federal law bars state and local governments from enforcing land use and prison regulations that impose a "substantial burden" on "the religious exercise of a person" absent demonstration of a compelling governmental interest. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a). Thus, courts resolving challenges under RLUIPA must examine

many of the same questions presented by RFRA cases. A decision that affords automatic deference to a religious objector's view of substantial burden and least restrictive means could call into question settled RLUIPA precedent and undermine many different types of state action.

RLUIPA cases consistently examine the question of substantial burden as a legal determination, which often hinges on issues of causation. A shift towards almost complete deference to a plaintiff's view of burden could require States and localities to defend land use and prison regulations under strict scrutiny – regardless of whether there is any legal or practical link between the objector's belief and the asserted burden or harm. For example, in *San Jose Christian College v. City of Morgan Hill*, the Ninth Circuit rejected a plaintiff college's RLUIPA challenge to the city's denial of a zoning application after the college failed to provide all information required for the application. 360 F.3d 1024, 1027-1029 (9th Cir. 2004). In determining whether there was a substantial burden, the court examined how the zoning process worked and concluded: "The City's ordinance imposes no restriction whatsoever on College's religious exercise; it merely requires College to submit a *complete* application, as is required of all applicants." *Id.* at 1035. Simply deferring to a plaintiff's conception of substantial burden – in this instance and similar cases – could encourage additional and costly litigation and call into question a substantial number of

reasonable, neutral laws that do not in fact burden a person's exercise of religion.[14]

Smith v. Allen illustrates the same concerns in the prison context. 502 F.3d 1255. In that case, an Alabama state prisoner requested a quartz crystal for his practice of Odinism, a faith "grounded in ancient Icelandic sagas and runic mysticism." *Id.* at 1261. The court explicitly rejected plaintiff's argument that his assertion of substantial burden was all that was required. "Such an expansive reading of [the statute], however, would require [the court] to find a substantial burden whenever *any* request in connection with a sincere religious belief was denied . . . ." *Id.* at 1278 (emphasis in original). A rule that would require deference to petitioners' views on substantial burden in this case could spill over to state prison and land use cases in contradiction of these and other precedents.

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[14] *See also Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 99 (1st Cir. 2013) (court "evaluate[d] the actual, tangible burdens that existence" of the ordinance imposed instead of accepting plaintiff's assertion that passage of historic preservation district constituted substantial burden); *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 750 (Mich. 2007) (court independently examined the impact of the zoning decision on plaintiff's religious exercise: "The city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built."); *N. Pac. Union Conference Ass'n of the Seventh Day Adventists v. Clark County*, 74 P.3d 140, 145-147 (Wash. Ct. App. 2003) (rejecting RLUIPA claim for failure to present evidence to support asserted substantial burden).

The impact of a change in the RFRA analysis could also have broad state impacts because a number of States have enacted their own laws modeled after the federal RFRA. While cases interpreting the federal Act are not binding in this context, state courts have often interpreted state acts to be consistent with the substantially similar federal provisions. *See, e.g.*, *State v. Hardesty*, 214 P.3d 1004, 1008 n.7 (Ariz. 2009); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 76 (N.M. 2013). Courts considering religious challenges to state laws also frequently reference federal decisions under RFRA where parties invoke free exercise protections under state constitutions. The same causation inquiry at the heart of the substantial burden test has consistently been applied by state courts in decisions under these laws, and eliminating this analysis risks destabilizing many areas of state and local law.[15]

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[15] *See, e.g.*, *Attorney General v. Desilets*, 636 N.E.2d 233, 236-238 (Mass. 1994) (court conducted own causation inquiry to determine whether plaintiff demonstrated state anti-discrimination law imposed substantial burden on religious exercise); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 928-929 (Cal. 1996) (plurality) (undertaking independent causation analysis to determine whether plaintiff demonstrated anti-discrimination law imposed substantial burden); *Warner v. City of Boca Raton*, 887 So.2d 1023, 1033-1035 (Fla. 2004) (court held that failure to independently investigate actual impact of regulation on ability to engage in conduct religion requires or forbids "would 'read out of [the Florida Religious Freedom Restoration Act] the condition that only substantial burdens on the exercise of religion trigger the compelling interest

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Moreover, a number of States use religious opt-out accommodations similar to the one provided by the ACA and its implementing regulations. A rule that would require the government to construct some additional accommodation beyond or instead of the challenged opt-out accommodation could call into question these state actions. These States have found this type of accommodation to be the most effective, and least restrictive, means to balance the sometimes competing rights and interests of religious objectors and third parties. For example, New York protects the religious freedom of private hospitals and their individual health-care providers by allowing them to opt out of providing treatment that violates their beliefs. *See* N.Y. Pub. Health Law § 2994-n. To protect patients' rights to receive medical treatment, the objecting hospital or provider must give notice of the religious objection and promptly transfer the patient to a different hospital or provider willing to provide the treatment. *Id.*; *see also* Pamela H. Del Negro & Stephen W. Aronson, *Religious Accommodations for Employees in the Health Care Workplace*, 8 J. Health & Life Sci. L. 72 (2015) (50-State survey of health-care related right-of-refusal laws). Similarly, North Carolina and Utah have statutes protecting the religious rights of employees charged with issuing marriage licenses, allowing them to opt out of providing licenses that they object to on religious grounds

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requirement'" (quoting *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001))).

by taking steps to transfer responsibility for such licenses to nonobjectors. *See* N.C. Gen. Statutes § 51-5.5; Utah Code Annotated § 17-20-4. And California allows individual pharmacists to opt out of dispensing drugs and devices on religious grounds as long as they provide prior written notice and their employer is able to ensure that patients have timely access to the objected-to drug or device. *See* Cal. Bus. & Prof. Code § 733(b)(3). Each of these opt-out accommodations might be called into question if the standards sought by petitioners were applied through state-law RFRA or constitutional challenges.

A rule that preserves a "sensible balance" in both the "substantial burden" and "least restrictive means" inquiry under RFRA will help preserve the balance already struck by the States in their laws and courts in analogous circumstances. Nothing in RFRA requires, nor condones, the sharp departure from established precedent requested by petitioners.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

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